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IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* SENATORS ALAN CRANSTON, ROBERT J. DOLE, ORRIN HATCH, EDWARD M. KENNEDY, CLAIBORNE PELL, ROBERT T. STAFFORD, LOWELL P. WEICKER, JR., AND REPRESENTATIVES MARIO BIAGGI, DON EDWARDS, WILLIAM D. FORD, JAMES M. JEFFORDS, GEORGE MILLER, AUSTIN J. MURPHY, AND PAT WILLIAMS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

This brief is submitted on behalf of current Members of the United States Congress. As Members of Congress, *Amici* have a compelling interest in the proper construction of statutes, and leave to file is frequently granted congressional *Amici*, particularly where, as here, legislative history must be examined extensively. *E.g.*, *Myers v. United States*, 272 U.S. 52 (1926). Because Congress'

intention in enacting the Rehabilitation Act of 1973 and subsequent amendments thereto was to preclude all discrimination against handicapped persons by recipients of federal financial assistance, *Amici* submit the following brief in support of respondent.[1]

SUMMARY OF ARGUMENT

Conrail contends that in enacting the 1978 Amendments to the Rehabilitation Act of 1973, Congress intended to curtail the right of the handicapped to be free from employment discrimination by recipients of federal funding. The court below properly rejected this assertion. Analysis of the terms, purpose, and legislative history of the Amendments discloses Congress' intent to broaden the Act's prohibition of discrimination. No evidence exists to support Conrail's contrary position.

Considered in view of its stated objectives, the Rehabilitation Act and its Amendments form a coherent whole only if the Act prohibits employment discrimination by all Federal grantees. As this Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), there is a national policy "to avoid the use of Federal resources to support discriminatory practices." With respect to handicapped persons, this policy is embodied in the Rehabilitation Act, as amended. The construction of the Rehabilitation Act urged by Conrail would contravene this national policy and frustrate congressional efforts to rehabilitate handicapped individuals.

Although the issue was not raised in the court below, Conrail also contends that a handicapped victim of discrimination may not vindicate his or her rights through a private cause of action. This assertion is contrary to the overwhelming consensus of the lower federal courts. Congress' intent to establish a private right of action

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[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

under § 504 is clearly established by reference to the relevant factors outlined by this Court in *Cort v. Ash*, 422 U.S. 66 (1975).

Once an implied right of action is recognized, the full panoply of traditional remedies, including monetary relief, is available unless Congress has clearly evinced its intent to provide only a partial remedy. There is no evidence of a congressional intent to limit remedies to injunctive relief. Indeed, monetary relief is often, as in this case, the only effective means of vindicating the individual rights afforded by § 504. Accordingly, there is no basis for denying an appropriate remedy, including monetary relief, to a handicapped victim of illegal discrimination.

ARGUMENT

I. LEGISLATIVE HISTORY ESTABLISHES CONGRESS' INTENT THAT EMPLOYMENT DISCRIMINATION BE PROSCRIBED BY SECTION 504 OF THE REHABILITATION ACT OF 1973.

Conrail acknowledges that "Congress enacted Section 504 as a broadly worded prohibition of discrimination on the basis of handicap by recipients of Federal financial assistance." Pet. Br. at 14. Nevertheless, Conrail contends that the Rehabilitation Act forbids an employment discrimination action against a Federal grantee except where the purpose of the Federal financial assistance is to provide employment. There is no basis for this contention.

The language of the Act is plain. In pertinent part, § 504 provides:

> *No* otherwise qualified handicapped *individual* . . ., *shall*, solely by reason of his handicap, . . . *be subjected to discrimination under any program or activity receiving Federal financial assistance*. . . .

29 U.S.C. § 794 (emphasis added). Employment discrimination is neither expressly nor impliedly excluded

from the broad coverage of the Act. *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767, 769-70 (3d Cir. 1982), *cert. granted*, 103 S.Ct. 1181 (1983). Nor does the Act limit the prohibition of discrimination to circumstances where federal financial assistance is related to employment. On the contrary, § 504, on its face, applies to "*any* program or activity receiving Federal financial assistance" (emphasis added). *See Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3535 (U.S. Jan. 11, 1983) (No. 82-1159).

Since employment is not expressly excluded, the Act must be interpreted to cover such discrimination "unless other considerations counsel to the contrary." *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982). In search of "other considerations," it is proper to turn to the legislative history of the Act for "evidence as to whether Congress intended to limit [its] expansive language." *Id.* at 522. A review of that legislative history discloses no such evidence.

Initial guidance as to the meaning of § 504 is provided by the Act's stated purpose: "to promote and expand *employment* opportunities . . . for handicapped individuals. . . ." 87 Stat. 357, 29 U.S.C. § 701(8) (emphasis added). The interdependent themes of expanding employment opportunities and of prohibiting employment discrimination are repeated in the congressional reports and floor debates. For example, Senator Williams, a sponsor of the Act and chairman of the committee that reported the bill, stated that the legislation included: "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24,588 (1973). Senator Javits, also a sponsor and the ranking minority member of the same committee, similarly emphasized the Act's provision for "opportunities for employment of the handicapped." 119 Cong. Rec. 5887 (1973). Senator Cranston noted that the Act would ad-

dress "unfounded discrimination in employment." 119 Cong. Rec. 5882 (1973). Senator Taft emphasized the need for strong antidiscrimination provisions: "*Too many handicapped Americans . . . lack jobs . . .* we must devote more of our energy toward the elimination of the most disgraceful barrier of all—*discrimination.*" 119 Cong. Rec. 24,587 (1973) (emphasis added). Significantly, no member of Congress spoke of any limitations upon the Act's prohibition of employment discrimination.[2]

Nor were these statements at variance with Congress' purpose, since the Rehabilitation Act is in large measure directed at employment discrimination. Before considering the Act the Senate Labor Committee held extensive hearings on the need for vocational rehabilitation of handicapped persons. Witnesses repeatedly testified that employment discrimination was rendering ineffective many vocational rehabilitation efforts. In summarizing the testimony, the Senate Committee report spoke of the need to address "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, *e.g., employment discrimination . . . .*" S. Rep. No. 318, 93d Cong., 1st Sess. 3, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078 (emphasis added). Congress' response to this need was the enactment of § 504.

Section 504 must be interpreted in the light of the structure and objectives of the Rehabilitation Act as a

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[2] Conrail attempts to dismiss the statements of Senators Cranston and Javits as mere "expressions of the overall purposes of the Act." Pet. Br. at 16 n.13. This Court has noted, however, that "remarks, as those of the cosponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 526-27; *see FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such a statement "deserves to be accorded substantial weight in interpreting the statute."). Moreover, Conrail cites no references to congressional debates supporting its assertion that Congress intended to limit the Act's application to employment discrimination.

whole, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), so as to be in harmony with the larger purpose of the enactment of which it forms a part. *North Haven*, 456 U.S. at 521-22; *TVA v. Hill*, 437 U.S. 153, 188 (1978). Because Conrail's interpretation of § 504 is inconsistent with the Act's structure and objectives, which are aimed largely at employment discrimination, that interpretation must be rejected. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

In view of the congressional purpose to promote employment opportunities for the handicapped, and having cited employment discrimination as a major problem, it would be incomprehensible for Congress to have excluded from the Act a prohibition of employment discrimination. Without such a provision, all other congressional efforts to expand employment opportunities might be thwarted. A contrary conclusion would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 513 (1981) (citations omitted).[3]

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[3] *See Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2025-26 (1983).

> The general words used in the clause, . . . taken by themselves and literally construed without regard to the object in view would seem to sanction the claim of the plaintiff. But this mode of expounding the statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the legislature intended to accomplish. And it is well settled that in interpeting the statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*

Id., quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857) (emphasis by the court). *See also New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

Congressional action and statements after enactment of § 504 also confirm that it prohibits employment discrimination. In 1974, the Rehabilitation Act was amended to clarify the fact that employment discrimination was not the *only* form of prohibited discrimination.[4] The Senate committee report on the 1974 Amendment states:

> It was clearly the intent of Congress in adopting . . . Section 504 (nondiscrimination) that *the term "handicapped individual" in [that] section was not to be narrowly limited to employment (in the case of Section 504).*[5]

Because this amendment was enacted to clarify the 1973 Act, it should "be accorded great weight when interpreting Congressional intent." *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1258 n.48 (3d Cir. 1979), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969).

Similarly, during consideration of related legislation, references to the Rehabilitation Act made clear Congress' view that it prohibited employment discrimination.[6]

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[4] *See* Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1618, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373. Section 8(6) of the 1973 Act defined "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial *handicap to employment* and (B) can reasonably be expected to *benefit in terms of employability* from vocational rehabilitation services provided pursuant to Titles I and III of this Act" (emphasis added). In 1974, the definition was broadened to include any person suffering an "impairment . . . [of] major life activities." 29 U.S.C. 706(6).

[5] S. Rep. No. 1297, 93d Cong. 2d Sess. 37, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6388 (emphasis added).

[6] The conference report on the Education For All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461, stated:

> It is clear that *qualified handicapped individuals*, who, because of their handicaps are *refused employment* by recipients of

Not a shred of legislative history contemporaneous with the enactment of the Rehabilitation Act or the 1974 Amendments supports the proposition that the Act does not prohibit employment discrimination. To the contrary, § 504's prohibition of employment discrimination is properly viewed as a congressional effort to guarantee the effectiveness of the vocational rehabilitation programs established during the same period.

II. THE 1978 AMENDMENTS TO THE REHABILITATION ACT DO NOT LIMIT THE REACH OF SECTION 504.

In 1978, Congress amended the Rehabilitation Act again.[7] Conrail finds in § 505(a)(2), which was added by the 1978 Amendments, a congressional intent to limit the reach of the Act. That provision states:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964, shall be

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assistance under the Act *are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973.*

S. Rep. No. 455, 94th Cong., 1st Sess. 53, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480, 1504.

In like fashion, a proposed section of the Education Amendments of 1974 forbidding discrimination against physically handicapped teachers attempting to secure employment in federally funded programs was dropped "because section 504 of the Rehabilitation Act of 1973, which is now in effect, prohibits such discrimination." S. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4206, 4250.

While these references are to different legislation than that at issue here, subsequently enacted statutes declaring the intent of an earlier statute are entitled to great weight in statutory construction. *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *FHA v. The Darlington*, 358 U.S. 84, 90 (1958). Significantly, there is no suggestion in the legislative history of either Act that § 504's prohibition of employment discrimination is affected in any way by the purpose of the federal funding.

[7] Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312.

> available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section 794 of this title.

29 U.S.C. § 794a. Section 604 of Title VI includes the following limitation:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

Conrail contends that this limitation is incorporated in the Rehabilitation Act by § 505(a)(2).[8] The court below properly rejected this contention. The language of § 505(a)(2) does not compel this result, and the legislative history of the 1978 Amendments will not permit it.

A. Congress Intended to Expand the Reach of Section 504 by Enacting the 1978 Amendments.

If, as Conrail contends, Congress intended in 1978 to limit the reach of the Rehabilitation Act, it is extraordinary that the Amendments' legislative history contains no evidence of such a purpose. Implied repeals are not favored. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Had Congress intended to limit the reach of

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[8] The position urged by Conrail was adopted by the Fourth Circuit Court of Appeals in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). The *Trageser* holding was embraced without further analysis by the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980); the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982). The *Trageser* analysis was rejected by the court below and by the Eleventh Circuit in *Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376 (11th Cir. 1982).

§ 504's employment coverage, it would have done so clearly.[9]

Contrary to Conrail's assertion, "[t]he overwhelming impression created by the legislative history of the 1978 Amendments is that Congress intended to *expand* the remedies available under the Act." *Hart v. County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal 1979) (emphasis in original). Both the committee report[10] accompanying the Amendments and the floor debates[11] concerning them disclose a congressional purpose to expand the Act, to which no objection was raised. Neither source contains a hint of any intent to limit the Act's application to employment discrimination.

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[9] *See Hart v. County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal. 1979) ("[I]n light of the great emphasis which the Act places upon securing employment opportunities for handicapped individuals, it is remarkable to attribute to Congress a desire to get this protection by such a deft, unheralded maneuver.")

[10] The report describes the enactment of § 505 as designed to "*enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of Title V." S. Rep. No. 890, 95th Cong., 2d Sess 18 (1978) (emphasis added). The reconciliation of House and Senate versions of the Amendments is reported in House Conf. Rep. No. 1780, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312. Because the conference report notes only that the House receded in its opposition to § 505(a)(2), the "controlling" legislative history is found in the Senate report.

[11] For example, Senator Stafford noted that the 1978 Amendments would "allow the rehabilitation program to *grow* and serve *more* handicapped individuals." 124 Cong. Rec. 30,311. Senator Cranston, who was the author of § 505, pointed out that after amendment of the Act, "[f]ederal contractors and grantees would—appropriately—continue to be required to be equal opportunity employers." 124 Cong. Rec. 30,578. Congressman Jeffords, in discussing the elimination by the Amendments of an exemption for the Federal government, described the Amendments as "going a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong. Rec. 13,901 (1978). No member of Congress rose in opposition to any of these statements.

The enactment of § 505—a provision described as "designed to enhance . . . compliance with the civil rights provisions of Title V," *see* note 10 *supra*—cannot logically be interpreted to limit existing remedies. Particularly in view of the remedial purpose of § 504, any amendment thereto "should be broadly applied and liberally construed" in the absence of a compelling indication of contrary congressional intent. *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

B. Congress Expressly Stated Its Intent to Codify Existing Agency Practice Which Provided a Broad Scope for Section 504.

Prior to the enactment of the 1978 Amendments, HEW promulgated regulations implementing § 504, 45 C.F.R. 84.11-.14 (1977), which broadly prohibited discrimination in employment by Federal grantees *without regard to the purpose of the financial assistance received.* HEW submitted the regulations to Congress on April 28, 1977.[12]

Congress considered the regulations in the course of oversight hearings on § 504,[13] and the Senate committee report on the 1978 Amendments discusses them. The Report then states: "This amendment codifies existing practice as a specific statutory requirement." S. Rep. 95-890 at 19.

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[12] In a press release announcing promulgation of the regulations, the HEW Secretary described the regulation as "the basis for other similar regulations that will be used by all other federal departments and agencies and that *will affect all recipients of federal funds.*" HEW News, April 29, 1977 (emphasis added).

[13] *Implementation of Section 504 of the Rehabilitation Act of 1973: Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. (1977). *See* Testimony of David S. Tatel, Director, Office for Civil Rights, Department of Health, Education, and Welfare at 294 ("With regard to employment practices, the regulations require nondiscriminatory recruitment, hiring, compensation, job assignment and classification, and fringe benefits.").

Even were Congress unaware of HEW's interpretation of § 504, that interpretation would be entitled to substantial judicial deference. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153 (1946). The construction of a statute by an agency charged with its administration must be followed unless there are compelling indications that the agency's interpretation is either "plainly erroneous" or "demonstrably irrational." *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *Dublino*, 413 U.S. at 421. Here, judicial deference is even more appropriate because Congress knew of the agency interpretation, cited it when amending the statute, and expressly adopted the agency's interpretation.

> Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation, although it has amended the statute in other respects, presumably the legislative intent has been correctly discerned."

North Haven, 456 U.S. at 535, *quoting United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979).[14]

Conrail suggests that Congress "overlooked" the differences between HEW's § 504 and Title VI regulations, implying that Congress was unaware of the scope of the HEW regulations it expressly approved. Pet. Br. at 21.

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[14] *See also Lorillard Division of Loew's Theaters, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380-82. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction.*" *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981) (emphasis added); *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Miller v. Youakim*, 440 U.S. 125, 144-145 (1979); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

However, Representative Dodd specifically called attention to the HEW regulations during debate on the 1978 Amendments.[15] Moreover, when HEW promulgated the § 504 regulations, it pointed out that § 504 differed from Title VI "in the extent to which it applies to employment practices." 42 Fed. Reg. 22,676 (1977). As the court below noted, no member of Congress "suggested HEW had gone too far." *LeStrange*, 687 F.2d at 774. Nor does the committee report citing these regulations contain anything to indicate a belief that HEW had exceeded its authority.[16]

In sum, the legislative history of the 1978 Amendments shows Congress' approval of the prevailing interpretation of § 504, thus confirming Congress' intent that the 1978 Amendments not limit the scope of § 504's prohibition of discrimination.

C. Congress Acquiesced in Agency Practice Subsequent to the 1978 Amendments Which Provided A Broad Scope for Section 504.

More than twenty federal agencies have promulgated regulations implementing § 504 since the 1978 Amend-

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[15] Representative Dodd "strongly supported" issuance of the regulations and stated that "the protections [these regulations] established for the handicapped are very much needed." 124 Cong. Rec. 13,905 (1978).

[16] Congress was presumably also aware of judicial decisions which, like the regulations, interpreted § 504 to prohibit all handicap employment discrimination by federal grantees. Prior to the 1978 Amendments, all the federal courts considering whether § 504 prohibits employment discrimination held it to do so without reviewing the purpose of the federal funding. *See Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F.2d 184 (3d Cir. 1977).

ments.[17] *In every case*, these regulations prohibit employment discrimination by all recipients of Federal funding, without reference to the purpose of the funding. Similarly, after enactment of the 1978 Amendments, more federal courts joined the ranks of those holding that § 504 prohibits discrimination regardless of the primary objective of the federal assistance.[18] Congress, however, took no steps to alter the interpretations of any of these agencies or courts.

It was only after the decision of the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), that objection was voiced in Congress to an interpretation of § 504. The Senate committee responsible for reporting

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[17] *See* 45 C.F.R. 1232.9-.12 (ACTION); 34 C.F.R. 104.11-.14 (Dept. of Education); 45 Fed. Reg. 40514 (1980), to be codified at 10 C.F.R. 1040.66-.69 (Dept. of Energy); 45 Fed. Reg. 66,706 (1980), to be codified at 29 C.F.R. 32.12-.17 (Dept. of Labor); 45 Fed. Reg. 37,620 (1980), to be codified at 28 C.F.R. 42.510-.513. (Dept. of Justice/LEAA); 45 C.F.R. 1624.6 (Legal Services Corporation); 45 C.F.R. 1151.31-.34 (National Endowment for the Arts), 14 C.F.R. 1251.200-.203 (NASA); 45 Fed. Reg. 14,533 (1980), to be codified at 10 C.F.R. 113.3(c) (Small Business Administration); 45 Fed. Reg. 69,437 (1980), to be codified at 22 C.F.R. 142.11-.14 (State Department); 45 Fed. Reg. 22,893 (1980), to be codified at 18 C.F.R. 1307.5 (TVA); 45 Fed. Reg. 63,264 (1980), to be codified at 38 C.F.R. 18.411-.414 (Veterans' Administration); 43 Fed. Reg. 16,652 (1978) (Dept. of Housing and Urban Development); 43 Fed. Reg. 15,737 (1978) (National Endowment for the Humanities); 45 Fed. Reg. 24,074 (1980) (Dept. of Interior); 44 Fed. Reg. 77,356 (1979) (Office of Revenue Sharing); 44 Fed. Reg. 68482 (1979) (EEOC); 47 Fed. Reg. 25,463-64 (June 11, 1982) (Dept. of Agriculture); 47 Fed. Reg. 25,337 (June 11, 1982) (General Services Administration); 47 Fed. Reg. 15,112-27 (April 6, 1982) (Dept. of Defense); 47 Fed. Reg. 8570-73 (March 1, 1982) (National Science Foundation); 46 Fed. Reg. 55,894-90 (November 12, 1981) (National Foundation for the Arts and Humanities).

[18] *See LeStrange*, 687 F.2d at 776; *Jones*, 681 F.2d at 1382; *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979); *Whitaker v. Bd. of Higher Education*, 461 F. Supp. [illegible] (E.D.N.Y. 1978).

both the Rehabilitation Act and the 1978 Amendments expressed disapproval of *Trageser*. The committee stated:

> [*Trageser*] *is not consistent with Congress' original and continuing intent* that handicapped individuals be empowered to bring suit in Federal District Courts for alleged employment discrimination in violation of [§ 504] regardless of the designated use of the federal funds received by the employer in question.

S. Rep. No. 316, 96th Cong., 1st Sess. 1213 (1979) (emphasis added).[19]

Congress' acquiescence in the agencies' unanimous interpretation that § 504 prohibits *all* employment discrimination by recipients of federal funds, coupled with Congress' speedy disapproval of the *Trageser* court's contrary interpretation, confirms Congress' intent that the prohibition of employment discrimination not be linked to the purpose of federal funding. *See Commissioner v. Estate of Noel*, 380 U.S. 678, 681-82 (1965); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

D. Even If Section 505(a)(2) Incorporated Into The Rehabilitation Act the Title VI Limitations Embodied in Section 604, the Plain Language of Section 604 Precludes Its Application To This Case.

By its terms § 604 of Title VI applies only to action "by any department or agency." Conrail asserts, however, without citation of case authority or legislative his-

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[19] Conrail asserts that the Committee's disavowal of *Trageser* should be accorded little weight, contending that a statement in a report declaring the intent of a prior statute is "less weighty" than subsequent legislation declaring the intent of an earlier statute. Pet. Br. at 22-23. In this case, however, there is no subsequent legislation declaring the intent of an earlier statute to which the Court may look for guidance. Moreover, even if a statement contained in a report is less weighty than a statute, it is certainly *more* weighty than an assertion by Conrail unsupported by *any* citation to legislative history. *Cf. Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979).

tory, that § 604 limits private enforcement as well as government enforcement of § 504. Reading *Community Television of Southern California v. Gottfried*, 51 U.S.L.W. 4134 (U.S. Feb. 22, 1983) (No. 81-298), grossly out of context, Conrail asserts that Congress did not intend to vest individuals with substantive rights broader than those subject to agency enforcement. Pet. Br. at 10. In fact, *Community Television* considered only the issue of which agency among those with overlapping jurisdiction had the primary responsibility for enforcing § 504. *Community Television* in no way supports the proposition that § 604's limitation on agency or department actions also limits private actions.

Thus, even assuming *arguendo* that § 604 could be relevant to actions under the Rehabilitation Act, § 604 limits only agency action. This Court should not lightly impute to Congress the intent to limit a right which it has conferred, particularly in the face of express congressional disapproval of prior judicial declarations to that effect.

III. CONTRARY TO CONRAIL'S ASSERTION, THERE IS A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 504, IN WHICH THE COURT MAY DRAW UPON THE FULL PANOPLY OF TRADITIONAL REMEDIES, INCLUDING MONETARY RELIEF.

Conrail also contends that there is no private right of action under § 504, and that, if a cause of action does exist, monetary relief may not be awarded. Neither of these theories was presented to the court below. Both are meritless.

A. The Congressional Intent Manifested in the Statutory Language and Legislative History Establishes a Private Right of Action To Remedy Violations of Section 504.

Congress' intent to create a private cause of action to enforce § 504 has long been recognized by the federal courts. All the Courts of Appeals that have addressed

the question, now totaling eight, have held that there is an implied private cause of action.[20] District courts in the remaining circuits have also so held.[21] In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court held that a private cause of action is implicit in Title IX, on which § 504 was modeled, and whose language and legislative history are equivalent to those of § 504 in virtually every relevant respect. Since *Cannon*, seven Justices have also recognized an implied right of action under Title VI, the other model for § 504.[22] Application of the *Cannon* analysis demonstrates that there is also a private right of action under § 504.

Congressional intent determines whether a statutory section defining private duties creates an implied private right of action. *E.g.*, *Cannon*, 441 U.S. at 688. Congress' intent to provide a private remedy is suggested by § 505(b) of the Rehabilitation Act, which provides:

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[20] *Miener v. State*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S. Ct. 215 (1982); *Pushkin v. Regents of the University of Colorado*, 659 F.2d 1372 (10th Cir. 1981); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977).

[21] *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981); *Fells v. Brooks*, 522 F. Supp. 30 (D.D.C. 1981); *Cruz v. Collazo*, 84 F.R.D. 307 (D. Puerto Rico 1979); *Michigan Paralyzed Veterans v. Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977).

[22] *Guardians Assoc. v. Civil Serv. Comm'n*, 51 U.S.L.W. 5105 (U.S. July 1, 1983) (No. 81-431) at 5110-12 (White, J., announcing judgment, joined by Rehnquist, J.); at 5113 (O'Connor, J., concurring in the judgment); at 5114-20 (Marshall, J., dissenting), at 5120-23 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.).

> In *any action or proceeding* to enforce or charge a violation of a provision of this subchapter, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. § 794a(b) (emphasis added) (1981 Supp. V).

On their face, the words "action or proceeding to enforce or charge a violation" encompass private enforcement. Moreover, this attorneys' fee provision is only meaningful in the context of a private cause of action.

Application of the *Cannon* analysis amply demonstrates that Congress' intent accords with that apparent meaning. In *Cannon* the Court examined four factors first outlined in *Cort v. Ash*, 422 U.S. 66 (1975). The first inquiry is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?" *Id.* at 78. The second inquiry looks to the legislative history for "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Id.* The third asks "Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . .?" *Id.* The final question is whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States . . .?" *Id.*

All of the four factors favor a private right of action. First, by its terms, § 504 protects "otherwise qualified handicapped individual[s]." This language "expressly identifies the class Congress intended to benefit." *See Cannon*, 441 U.S. at 690. The wording is substantially identical to that of Title IX—language which this Court has described as having "an unmistakable focus on the benefited class." *Id.* at 691. "Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of action." *Id.* at 693-94.

The second *Cort* factor calls for an examination of the legislative history.[23] "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 [Title VI], ... and Section 901 of the Education Amendments of 1972 [Title IX] . . . ." S. Rep. No. 93-1297 at 4. By the time the Rehabilitation Act was enacted in 1973, it was widely recognized that the same language sufficed to create a private right of action when used in Title VI. This Court has noted that the issue had been "squarely decided" in 1967, "in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years." *Cannon*, 441 U.S. at 696. Because § 504, like Title IX, was patterned on Title VI and enacted in light of its history of judicial interpretation, the conclusion reached in *Cannon* applies to § 504 with equal force: "[W]e are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent. . . ." 441 U.S. at 697-98.[24]

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[23] "We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon*, 441 U.S. at 694, *quoting Cort*, 422 U.S. at 82. Accordingly, where, as here, the first *Cort* factor is satisfied, "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling." *Id.* (emphasis in original).

[24] This conclusion is further buttressed by the interpretation given other statutes during the years immediately preceding enactment of § 504. This Court interpreted the "comparable language," *see Cannon*, 441 U.S. at 698, of § 5 of the Voting Rights Act to establish a private remedy. *Allen v. State Board of Elections*, 393 U.S. 544 (1969). During the period preceding enactment of § 504, this Court consistently found implied private remedies in other contexts. *See Superintendent of Insurance v. Bankers Life and Casualty Co. of New York*, 404 U.S. 6 (1971); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Wyandotte Transportation Co. v. United*

If the language is to be interpreted to have some contrary meaning, there must be clear evidence that Congress so intended. No such evidence is to be found.

The same Congress that enacted § 504 added clarifying amendments in its second session. *See* Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617. The Senate Report explicitly referred to the original and continuing intent to authorize private enforcement:

> The language of Section 504, in following [Title VI and Title IX], further envisions the implementation of a compliance program which is similar to those Acts. . . This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal Government as well as relative ease of implementation, *and* permit *a judicial remedy through a private action.*

S. Rep. No. 93-1297, at 39-40 (emphasis added). Congress made it abundantly clear that a private cause of action is afforded *in addition to* judicial review by separately listing the two types of proceedings.

The legislative history of the 1978 Amendments furnishes further evidence of Congress' intent to permit a private right of action. The Senate Report states:

> The committee believes that the rights extended to handicapped individuals under [*inter alia*, § 504] . . . are and will remain, in need of constant vigilance by handicapped individuals to assure compliance,

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States, 389 U.S. 191 (1967); *J. I. Case Company v. Borak*, 377 U.S. 426 (1964). *Cort*, which marked a somewhat stricter approach to the implication of private rights of action, was not decided until two years after enactment of § 504. The fact that the ultimate issue is congressional intent requires that a court take a more lenient view toward the implication of private rights of action in statutes that predate the more recent trend. *See Cannon*, 441 U.S. at 698-99.

> and the availability of attorney's fees should assist in vindicating *private rights of action* in cases . . . arising under Section 504.[25]

The third *Cort* factor provides that a private right of action will not be implied where it would frustrate the congressional purpose. "On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon*, 441 U.S. at 703.

Section 504 extends to the handicapped the two objectives embodied in its forerunners, Titles VI and IX: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704.[26] The statutory fund cutoff procedure will

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[25] S. Rep. No. 95-890, at 19 (emphasis added). Senator Cranston, a key proponent, reiterated the point before the full Senate. "To date, we have permitted certain private enforcement of [the title including § 504] and, yet, we have not provided the means by which such private rights of action are meaningful." 124 Cong. Rec. 30,346 (1978). In 1979 the Senate Committee on Labor and Human Resources stated its concurrence in the general understanding that there is and should be a private right of action. S. Rep. No. 96-316 at 12-13. *See* p. 25, *infra*. Such statements went completely unchallenged.

[26] Conrail's denial of the latter purpose cannot be supported. As already discussed, the statute is phrased in terms of individual rights and evinces an intent to benefit members of a particular class. The legislative history also explicitly indicates that the section is intended to provide for vindication of *individual* rights. *See, e.g.*, S. Rep. No. 95-890, at 19 ("[T]he rights extended to handicapped *individuals* . . . are, and will remain, in need of constant vigilance by handicapped *individuals* to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action. . . .") (emphasis added); 124 Cong. Rec. 30,346 (1978) (comments of Sen. Cranston) ("This amendment . . . will go a long way toward assisting long-neglected Americans—handicapped *individuals*—in their efforts to achieve their full and equal share of the rights to which they're entitled.") (emphasis added).

rarely, if ever, be effective in promoting the second purpose. *See id.* at 704-706. Funding termination is often considered by the funding agency to be too draconian a remedy in cases of isolated violations.[27] Yet Congress wanted to protect the handicapped from *all* illegal discrimination, including isolated instances. "In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded." *Id.* at 705. As this Court stated with respect to Title IX,

> . . . in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on [the agency enforcing the statute], the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.

441 U.S. at 705-06. The same reasoning applies to § 504.

Even when the government is willing to cut off funding, that would not achieve the purpose of vindicating a particular victim's rights. Prevention or deterrence of future violations does nothing to remedy his or her losses.[28] Moreover, even if effective remedies were available through the administrative process, they could not

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[27] *See, e.g., Lamber, Private Causes of Action Under Federal Agency Nondiscrimination Statutes,* 10 Conn. L. Rev. 859, 888 & n.150 (1978) (due to the "extreme and harsh" nature of the sanction, HEW cut off funding for only three educational institutions in 14 years).

[28] The inadequacy of funding termination is particularly poignant in cases such as the present one, where prospective relief provides no benefit at all to the family of the victim, who is now deceased.

reach every instance of prohibited conduct.[29] In sum, as in the case of Title IX, the proposition that "the individual remedy will provide effective assistance to achieving the statutory purposes" is "unquestionably correct." *Cannon*, 441 U.S. at 707-08.

The final *Cort* factor counsels hesitance in implying a private right of action where the subject matter involves an area basically of concern to the states. *Cannon*, 441 U.S. at 708. However, "[n]o such problem is raised by a prohibition against invidious discrimination of any sort. . . . Since the Civil War, the Federal Government and the federal courts have been the '*primary* and powerful reliances' in protecting citizens against such discrimination."[30] As in the case of Title IX, "[t]here can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy." *Id.* at 709.

Because all four of the *Cort* factors point in the same direction, there is no need for balancing, and the proper result is inescapable. *See Cannon*, 441 U.S. at 709. In sum, the uniform conclusion of the lower federal courts that Congress created a private right of action to enforce § 504 is correct.

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[29] When the question of a private cause of action under Title IX came before this Court, HEW candidly admitted that "as a practical matter, HEW cannot hope to police all federally funded education programs. . . ." *Cannon*, 441 U.S. at 708 n.42. The same is unquestionably true in the case of § 504, which applies not only to educational institutions, but to all entities receiving federal financial assistance. In this regard, it should be noted that the United States supports the position that a private right of action under § 504 is appropriate. *See* Brief Amicus Curiae of the United States, filed in this action, at 5-10.

[30] *Cannon*, 441 U.S. at 708, *quoting Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original), *quoting* F. Frankfurter and J. Landis, *The Business of the Supreme Court* 65 (1928). The predominance of the federal interest is yet clearer where, as here, the duties are imposed exclusively on the recipients of federal funds. *See Cannon*, 441 U.S. at 708-09.

B. In the Absence of Clear Evidence That Congress Intended to Limit the Scope of the Judicial Remedy It Provided, a Court May Draw on the Full Panoply of Traditional Remedies, Including Monetary Relief.

Conrail now contends for the first time that, even if a private remedy is available, monetary relief cannot be awarded. That assertion is entirely without merit.

Once a substantive right and a cause of action to enforce it have been recognized, the relief available depends principally on what is effective in alleviating the harm, for "the existence of a right implies all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1945) (footnotes omitted) (emphasis added).

Five Members of this Court have noted that, since the usual practice is to draw upon the full panoply of judicial remedies, the defendant must demonstrate a congressional intent to circumscribe the relief available.[31] *Accord, Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y.

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[31] *Guardians Assoc. v. Civil Serv. Comm.*, 51 U.S.L.W. 5105 (U.S. July 1, 1983), No. 81-431 at 5113 (O'Connor, J., concurring in the judgment), at 5117-20 (Marshall, J., dissenting), at 5120-21 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.). Justice O'Connor stated that equitable relief should not be circumscribed under Title VI. *Id.* at 5113. Since this case also involves equitable relief, *see* pp. 27-28 *infra*, it falls within the scope of her opinion. Although Justice O'Connor did not address the availability of damages, we submit that the principle and rationale of *Bell v. Hood* apply equally to such "legal" relief.

1980). Here, the statutory language and legislative history of § 504 are totally devoid of any indication that Congress intended the atypical step of excluding monetary relief. *Hutchings v. Erie City and County Library Board of Directors*, 516 F. Supp. 1265, 1268 (W.D. Pa. 1981).

Indeed, the understanding that monetary relief is available under § 504 was confirmed when a proposal was made to bring the handicapped under the protection of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 295, as amended, which provides for backpay, but not damages at law. The proposal was rejected on the ground that backpay was already available under the Rehabilitation Act. S. Rep. No. 96-316 at 12-13. Accordingly, even if specific evidence of the intent to include retrospective compensatory relief were necessary,[32] that requirement would be satisfied.

The general rule has long been that monetary relief is available to remedy violations of civil rights, including under those statutes that make no specific mention of damages.[33] If Congress had intended to depart from the usual practice it would have made its intention explicit, as it did with respect to other statutory schemes.[34]

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[32] In *Guardians Assoc.*, note 22 *supra*, two Justices took the view that there must be such evidence where the discrimination is unintentional and the implied right of action is created through an exercise of the Spending Power. *Id.* at 5109-11 (White, J., announcing the judgment). However, that case must be distinguished since Conrail cannot deny that LeStrange was intentionally refused employment on the basis of his handicap.

[33] These include suits under 42 U.S.C. § 1981, *Runyon v. McCrary*, 427 U.S. 160 (1976); 42 U.S.C. § 1982, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and 42 U.S.C. § 1983, *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled as to another holding, Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 663 (1978).

[34] For example, under Title VII Congress provided for the award of backpay but not compensatory damages. 42 U.S.C. § 2000e-5(g) (1976).

Accordingly, in the vast majority of decisions recognizing a private right of action under § 504, the courts have not limited their holdings to suits seeking particular types of relief.[35] Among those cases in which the defendant contended that monetary relief was unavailable, the weight of authority, including the sole Court of Appeals decision on the subject, holds that monetary relief is available.[36] On the other side, Conrail cites only one unreversed case holding that the private cause of action is limited to nonmonetary relief.[37]

Conrail's argument against monetary relief relies on *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979). But that case, which arose under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, has no force in the context of § 504.[38]

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[35] These include decisions in which the opinion explicitly states that damages were requested, *see Strathie v. Dept. of Transp.*, 547 F. Supp. 1367, 1370 (E.D. Pa. 1982); *Stubbs v. Kline*, 463 F. Supp. 110, 112 (W.D. Pa. 1978); *Drennon*, 428 F. Supp. at 812, as well as many in which it is unclear whether monetary as well as injunctive relief was sought.

[36] *Miener*, 673 F.2d at 969; *Gelman v. Dept. of Ed.*, 544 F. Supp. 651 (D. Colo. 1982); *Gregg B. v. Bd. of Ed.*, 535 F. Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & County Library Bd. of Directors*, 516 F. Supp. 1265 (W.D. Pa. 1981); *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980); *Poole v. S. Plainfield Bd. of Ed.*, 490 F. Supp. 948 (D.N.J. 1980). *See also Colin K. v. Schmidt*, 536 F. Supp. 1375 (D.R.I. 1982) (damages are "probably available").

[37] *Carter v. Independent School District No. 6*, 550 F. Supp. 175 (W.D. Okla. 1981). *Carter* simply relies on *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104 (N.D. Cal. 1979), a case offering only dicta on the subject.

[38] Section 206 of the Investment Advisors Act "simply proscribes certain conduct," *id.* at 19, which contrasts sharply with language conferring rights on a benefited class. Thus, *TAMA* is entirely consistent with *Cort*, *Cannon*, and the analysis in Section III.A, *supra*. Furthermore, *TAMA* provides no basis applicable to § 504 for distinguishing monetary and injunctive relief. Conrail attempts to read into that decision the suggestion that there must be special

Conrail also contends that monetary awards are inconsistent with the statutory purposes. But even if one accepted *arguendo* the remarkable premise that the legislation had no compensatory purpose, that does not mean that damages are inconsistent with other purposes. Civil liability not only is consistent with the purpose of eliminating discrimination, but significantly advances it through deterrence. This deterrence is particularly important in light of the fact that government funding termination is unlikely to occur accept in egregious cases.[39] Finally, Conrail asserts that since the Rehabilitation Act provides for appropriations, its major purpose is funding. However, § 504 is not a funding provision, but rather guarantees rights. The funding termination provision in § 505 makes it clear that eligibility for funding under other parts of the Act was meant to be *conditional* on compliance with § 504. It also demonstrates conclusively that Congress did not consider the imposition of major economic losses on violators to be counter to its purposes.

Conrail's reliance on *TAMA* in opposing monetary relief is grossly misplaced. *TAMA* not only fails to support Conrail's novel monetary/non-monetary distinction; it strongly suggests the availability of backpay. The Court held that § 215 of the Investors Advisors Act, which declares certain contracts void, authorizes an implied equitable remedy of rescission.[40] Restitution—a form of

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evidence of a congressional intent to provide a private suit for *damages* as opposed to a general intent to provide a cause of action, presumably including all forms of relief. There is no basis for that conclusion. Although the Court spoke of "private suits for damages" in connection with § 206 of the Act, this language served simply to distinguish those suits from suits for equitable relief under a different section (§ 215).

[39] *See* notes 27 & 29 *supra*.

[40] Under the usual *Cort* analysis, the case for a private right of action under § 215 was weak, since the statute is phrased in terms

monetary relief—could be ordered as an adjunct to rescission. Restitution complements rescission by requiring the return of any consideration given, thereby returning the parties to the approximate position they would occupy if the voided contract had never been entered. Similarly, backpay is an equitable remedy [41] which complements injunctive relief by giving the victim of employment discrimination the consideration he or she would have received but for the illegal discrimination. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). Accordingly, if an equitable declaratory or injunctive remedy is permitted under § 504, it is appropriate to allow backpay as well.[42]

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of a declaration of a legal conclusion, rather than identifying a benefited class of plaintiffs. Nevertheless, the Court recognized that the declaration would be meaningless unless there were some way that it could be brought before the courts. *TAMA* thus stands for the proposition that, even in some cases where the *Cort* factors do not favor an implied right of action, a limited remedy may nevertheless be necessary to prevent the statute from being totally without effect. Contrary to Conrail's suggestion, the recognition of a special remedy in *TAMA*, even though the first *Cort* factor is not present, does not support a *limitation* on available relief where the usual analysis points clearly toward a private right of action.

[41] Thus, in an implied cause of action under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. § 217 (1976), the authority to award backpay derives from the "historic power of equity." *Mitchell v. Robert DeMairio Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

[42] Permitting the award of backpay is especially appropriate since Congress has specifically stated its understanding that backpay is available. S. Rep. No. 96-316, at 12-13. *See* p. 25 *supra*.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the decision below and, in so doing, should declare that Section 504 of the Rehabilitation Act of 1973 provides to victims of employment discrimination a private right of action against a recipient of federal financial assistance, without regard to the purpose of the assistance, and that monetary relief may be awarded in such an action.

Respectfully submitted,

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